

**DEPARTMENT OF STATE REVENUE  
LETTER OF FINDINGS NUMBER: 01-0057  
SALES AND USE TAX  
FOR TAX PERIODS: 1997-1999**

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**Issues**

**1. Sales and Use Tax- Delivery Charges**

**Authority:** IC 6-8.1-5-1 (b), IC 6-2.5-2-1, IC 6-2.5-4-1(b), IC 6-2.5-4-1 (e) (2), IC 26-1-2-401(2), 45 IAC 2.2-4-3 (a), 45 IAC 2.2-4-3(b)(3).

The taxpayer protests the assessment of tax on delivery charges.

**2. Sales and Use Tax-Scotchguard Fees**

**Authority:** IC 6-2.5-4-1(e) (2), Sales Tax Information Bulletin #2, May, 2002.

The taxpayer protests the assessment on scotchguard fees.

**3. Tax Administration-Penalty**

**Authority:** IC 6-8.1-10-2.1, 45 IAC 15-11-2, 45 IAC 15-11-2.

The taxpayer protests the imposition of the ten percent (10%) penalty.

**Statement of Facts**

The taxpayer is a retail furniture store. After an audit, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional sales and use tax, interest and penalty. The taxpayer protested and a hearing was held on the issues of tax assessed on delivery charges, tax assessed on scotchguard applications, and the penalty.

**1. Sales and Use Tax- Delivery Charges**

### **Discussion**

The taxpayer delivers furniture with its own employees on its own trucks. The taxpayer's invoices include a separately stated delivery fee that covers the transportation services. The department assessed sales tax on the delivery fees. The taxpayer contends that the delivery fees are nontaxable services.

All tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC 6-8.1-5-1 (b).

Retail transactions made in Indiana are subject to sales tax. IC 6-2.5-2-1. A retail transaction is defined generally as the acquiring and subsequent selling of tangible personal property. IC 6-2.5-4-1(b). Except for certain enumerated services, sales of services are generally not retail transactions and are not subject to sales tax. Delivery prior to the transfer of title to the purchaser is, however, one of the enumerated services that is specifically subjected to sales tax. IC 6-2.5-4-1(e)(2).

The taxpayer maintains that separately stated delivery charges where no F.O.B. has been established are non taxable. The taxpayer bases this conclusion upon 45 IAC 2.2-4-3(b)(3) which states, "[d]elivery charge[s] separately stated where no F.O. B. has been established [are] non taxable." The taxpayer's reliance on F.O.B. designations in this case is misplaced. The Regulation's reference to F.O.B. designations are applicable only when public transportation companies deliver the product.

There are two prerequisites for separately stated delivery charges to be subject to sales tax. The Regulations state these prerequisites as "[s]eparately stated delivery charges are considered part of selling at retail and subject to sales and use tax if the delivery is made by or on behalf of the seller of property not owned by the buyer." 45 IAC 2.2-4-3(a). In this instance, the first prerequisite for assessing sales tax is met because the delivery of the furniture is made by the taxpayer.

Whether or not sales tax applies to these delivery charges, then, depends upon when title to the goods transferred to the buyer. The Indiana law concerning the passing of title of goods to the buyer states that, "Unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods. . . ." IC 26-1-2-401(2). The taxpayer offered no evidence indicating that title to the goods passed to the buyer at any point prior to delivery of the goods. The taxpayer's fact situation, then, meets the requirements of 45 IAC 2.2-4-3(a) with the delivery service taking place prior to the transfer of title to the buyer. The delivery charges are subject to Indiana sales tax.

### **Finding**

The taxpayer's protest is denied.

## **2. Sales and Use Tax-Scotchguard Fees**

### **Discussion**

The taxpayer offers purchasers the option of purchasing scotchguard application and related warranty. The department assessed additional sales tax on the application of the scotchguard prior to delivery of the product to the consumer pursuant to IC 6-2.5-4-1(e) (2) that provides that services provided prior to delivery are subject to the sales tax.

The taxpayer contends that the fee charged is actually for the exempt purchase of an optional warranty and not for the application of the scotchguard prior to delivery. The department's definition of an optional extended warranty is found in Sales Tax Information Bulletin #2, May, 2002 as follows:

Optional extended warranties and maintenance agreements may either be purchased alone, or purchased as an option with the sale of the covered product. Typically, the terms of these agreements provide assurances that any required service and parts will be provided in the event of a break down or malfunction of the covered product.

The taxpayer's evidence consists of an invoice from the company providing the chemical and the warranty to the taxpayer. The invoice shows no charge for this chemical to the taxpayer. The taxpayer's evidence and argument misses the point. There is no evidence that the taxpayer sells the warranty without applying the chemical. Therefore, the sale of the warranty is inextricable from the application of the chemical.

### **Finding**

The taxpayer's protest is denied.

### **3. Tax Administration-Penalty**

#### **Discussion**

The taxpayer also protests the imposition of the ten percent (10%) negligence penalty pursuant to IC 6-8.1-10-2.1. Negligence is defined at 45 IAC 15-11-2(b) as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case-by-case basis according to the facts and circumstances of each taxpayer." Id.

IC 6-8.1-10-2.1(d) allows the department to waive the penalty upon a showing that the failure to pay the deficiency was based on "reasonable cause and not due to willful neglect." Departmental regulation 45 IAC 15-11-2 (c) requires that in order to establish "reasonable cause," the taxpayer must demonstrate that it "exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed. . . ."

The taxpayer provided sufficient evidence that it was not willfully negligent in its failure to collect and remit sales tax on the delivery charges.

**Finding**

The taxpayer's protest to the imposition of the penalty is sustained.

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